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SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-492

ZALI FRIED, *Petitioner*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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SUPPLEMENT TO PETITION FILED 12-6-72. NOT PRINTED.

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OPINION BELOW

The opinion of the Court of Appeals for the Second Circuit, Appendix A, pp. 1a-5a, *infra,* is not yet reported.

JURISDICTION

The opinion and judgment of the Court of Appeals was filed on July 25, 1972. On August 15, 1972, Mr. Justice Marshall granted an order extending the time

to file a petition for writ of certiorari to and including September 23, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, under this Court's decision in *Nye & Nissen* v. *United States,* 336 U.S. 613 (1949), an accused may be convicted of aiding and abetting an illegal sale of stolen property in the absence of any direct proof of guilty participation, solely because she "participated in a managerial capacity" in a lawful "family business operation."

2. Whether "possession" as used in 18 U.S.C. § 659 and other federal criminal statutes relating to contraband requires proof of "dominion and control."

STATUTES INVOLVED

18 U.S.C. § 659 provides in relevant part as follows:

> Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motortruck, or other vehicle, or from any station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express; or
>
> Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen: * * *
>
> Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both;

but if the amount or value of such money baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

18 U.S.C. § 2315 provides in relevant part as follows:

Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities or money of the value of $5,000 or more, or pledges or accepts as security for a loan any goods, wares or merchandise, or securities, of the value of $500 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken; * * *

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

STATEMENT

Petitioner was named in a four-count indictment charging her, her husband Ishak Fried, her son by a former marriage Simon Brach, and one Aaron Schatten, with various offenses arising out of the theft of 589 cartons of Japanese stereos from a Brooklyn pier. After a trial by jury, petitioner and Brach were found guilty on Counts 2 (possession) and 3 (sale) of the indictment, with the jury unable to agree on a verdict as to the remaining defendants and the other counts. Petitioner was sentenced to three years imprisonment and a $5,000 fine on Count 2 and a subsequent two-year period of probation on Count 3 (App. 12-13[1]).

[1] "App." refers to the Joint Appendix for the Defendants-Appellants in two volumes, which was filed in the Court of Appeals.

The evidence at the trial showed that on October 22 and 23, 1970, an individual claiming to be a trucker representing the consignee appeared at Pier 21 in Brooklyn and loaded onto his truck 589 cartons, each containing 2 stereo units with the brand name "Unisonic". The fraudulent nature of this pick-up was discovered on October 26, 1970, when the real representative of the consignee came to the pier seeking the merchandise. The full shipment had consisted of 1250 cartons of stereo units and 21 cartons of spare parts, and the goods remaining were delivered to the proper consignee after certain identifying numbers were copied from the outside of the cartons.

On the morning of November 3, 1970, defendant Simon Brach, who owned an independent trucking operation, asked a New York City policeman whom he employed in his off-duty hours to drive Brach's truck to a store owned by Joseph Levy at 121 Orchard Street in New York City. The policeman did as requested and helped unload the merchandise into Levy's storage room, located in the loft of a building across the street from his small store. Brach was also present, and after the goods were unloaded he told the policeman that he did not have to wait for a receipt but could go immediately. The policeman was driving Brach's truck, and he testified that the merchandise he unloaded consisted of 50 cartons.

On the following day, federal and local law enforcement personnel conducted a search of Levy's storage room and found 85 Unisonic stereo units, which they seized. All the units had been removed from their cartons, but one carton was found in a hallway outside the loft (App. 158-167).

Levy testified that he had been offered the stereos by Ishak Fried on November 2. He asserted that the purchase price was $67 per set, although he admitted that he had never previously purchased from Fried any quantity even remotely this large.[2] He testified that Brach—whom he had seen only once before in three years, and who did not regularly deliver for the Fried Trading Company—delivered the stereos with another driver on the truck on the morning of November 3. Levy also testified that on the following Saturday—*i.e.*, three days after the stereos were seized—he called Mr. Fried to ask for a bill. Mrs. Fried answered and replied that she would speak to her husband when he came home from the synagogue. Levy testified that Mr. Fried later called and told him "he has to contact Simon Brach for the bill." Later that evening, Levy again called and spoke to Mrs. Fried, who said "she don't know nothing at all" (App. 19-41).

Mr. and Mrs. Fried and Brach were charged jointly in Count 3 with having sold and disposed of the Unisonic stereos to Levy (App. 8-9). The jury was unable to arrive at a verdict with regard to Mr. Fried—who testified and denied ever having sold or attempted to sell Unisonic stereos to Levy or to anyone else—but found Mrs. Fried and Brach guilty. The Court of Appeals sustained the conviction, while recognizing that "there was no direct evidence connecting appellant Fried with the Levy sale" (p. 3a, *infra*). In lieu of such evidence, it relied on "her activities in a managerial capacity in the family business operation," her alleged participation in the transaction on which

[2] Mr. and Mrs. Fried owned and operated an importing concern which did over $2 million in annual sales, and sold products to large New York City department stores, such as Abraham & Strauss, Korvette, Alexanders, etc. (Trial transcript, pp. 1085, 1087).

Count 2 was based, and the "sound and fair aiding and abetting charge" given by the District Judge (p. 3a, *infra*).

To support petitioner's conviction on Count 2, which charged receipt and possession of stolen goods in violation of 18 U.S.C. § 659, the prosecution produced the testimony of a Philadelphia wholesaler named William Hendler, who testified that Mrs. Fried, who did most of the selling for the Fried Trading Company and had called him 15 or 20 times regarding offers of merchandise, called him on or about October 28, 1970. He testified that she said she "had a good deal on an AM-FM 8-track stereo unit with speakers" for $58, and that he ordered 2 dozen (App. 206-208). The stereo units were delivered to him by the Yale Express Company on November 3, 1970, with the consignor indicated as G & S Trading Company at 55 Avenue A in New York City. He testified that the brand name was not mentioned in the telephone conversation, and that he received no bill or any subsequent communication from the Fried Trading Company regarding these stereos. (App. 231-234.) On November 24, 1970, FBI agents appeared at his place of business and seized the remaining Unisonic stereos.[3]

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[3] The prosecution's proof that these stereos were the same as had been taken from the Brooklyn pier turned on numbers that were written on the sides of the cartons and the serial numbers on the units themselves. There was, apparently, a substantial discrepancy between the numbers which the consignors provided as being those in the shipment and those which were found on the stereos remaining after the 589 were taken (see App. 1021-1067). While this confusion raises substantial doubt as to sufficiency of the prosecution's proof that the stereo units seized in Philadelphia—or even those in Levy's storage room—were indeed those stolen from the Brooklyn pier, we recognize that that question is not within this Court's standards for the granting of a petition for certiorari.

The Court of Appeals sustained the sufficiency of the evidence on Count 2 without discussing whether or not possession by the petitioner had been adequately proved. Apparently as proof of guilty knowledge, it relied on the fact that the offering price of the stereos was only $5 above the cost to the legitimate importer and $7 below his usual lowest selling price to retailers.[4] The Court of Appeals also relied on the fact that the Frieds sent no bill or invoice to Hendler and that the G & S Trading Company was apparently a fictitious concern.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals' holding that a conviction for aiding and abetting the sale of stolen merchandise may be sustained merely on proof that the defendant participated "in a managerial capacity in the family business operation," and that in the course of this employment she "participated" in a separate sale as to which she was not shown to have had guilty knowledge, represents an extreme extension of this Court's holding in *Nye & Nissen* v. *United States*, 336 U.S. 613 (1949)—a case that has been the subject of extensive discussion and disagreement in various Courts of Appeals.

Out of the entire testimony at trial, covering more than 1,000 transcript pages, the *only* evidence linking Mrs. Fried to the sale of the stolen stereos was (1) that she had done "most of the selling" for the Fried Trading Company for some time, (2) that she had offered Hendler by telephone "a good deal on an AM-FM eight

[4] Hendler testified, however, that he was a "distributor" who sold to retailers who would then resell the products to customers (App. 235-236).

track stereo unit," and the stereos delivered to Hendler by an independent trucker proved to be stolen merchandise, and (3) that Mrs. Fried had family ties to Simon Brach, who was connected with the Levy sale.

a. This evidence is patently insufficient to support a conviction of Mrs. Fried for aiding and abetting the sale of the stereos to Levy. The evidence is not only consistent with, but affirmatively suggests, the conclusion that Mrs. Fried was merely a participant in a lawful business used by others to carry out a scheme to dispose of stolen merchandise. There was only the slightest evidence that any of the other defendants knew that the merchandise was stolen, but even if they did, there is absolutely no basis—other than the plainly inadequate fact of business and family ties—to infer knowledge by Mrs. Fried.

b. The basic issue in this case has a broader significance than the insufficiency of the evidence to convict Mrs. Fried. It involves the scope of this Court's decision in *Nye & Nissen* v. *United States*, 336 U.S. 613 (1949), and the lengths to which that decision may be carried to support a conviction for aiding and abetting upon evidence of nothing more than lawful association with persons who are proved to have committed a crime.

In *Nye & Nissen*, the petitioners had been convicted of conspiracy and substantive offenses involving fraud upon the United States. The Court sustained the conviction of the individual petitioner on the substantive counts on the theory that the proof was sufficient, and the jury charge proper, to convict him for aiding and abetting the fraud. The Court reached this conclusion despite the absence of "direct evidence tying [the defendant] to the six false invoices involved in the sub-

stantive counts," 336 U.S. at 619, because of the circumstantial proof (1) that the defendant was "the promoter of a long and persistent scheme to defraud," of which the false invoices were a part; (2) that "the makers of false invoices were [the defendant's] subordinates"; (3) that he was the manager of the business and was in charge of the office where the invoices were prepared; and (4) that his family owned the business and his relatives were his chief subordinates.

The Court's opinion in *Nye & Nissen* makes it clear that evidence of the defendant's knowing participation in the "long and persistent scheme to defraud" was a *sine qua non* for the conviction of aiding and abetting. Yet a result of the opinion is that the other factors noted by the Court—factors which, absent the element of knowing participation in an overall scheme to defraud, are perfectly consistent with complete innocence—may be, and have been, relied upon by other courts to support convictions on no more evidence than that of business, family, or personal association with the participants in the crime, together with presence at the scene. We submit that this is exactly what the Court of Appeals did in this case.

c. The scope of the holding in *Nye & Nissen* has been the principal issue in several recent cases in the Courts of Appeals, with conflicting results.

In *United States* v. *Glantzman*, 447 F.2d 199 (3rd Cir. 1971), *Nye & Nissen* was relied upon by both the majority and the dissenter in reversing the conviction of an employer of aliens who had falsified employment documents required by statute. Though the evidence showed that the employer supervised the filling out of forms and was the sole proprietor of the business, the

court held 2-1 that this was not sufficient under *Nye & Nissen* to support a conviction for aiding and abetting the falsification by the aliens.

But in *Hall* v. *United States*, 286 F.2d 676 (5th Cir.), *cert. denied*, 366 U.S. 910 (1965), the court upheld a conviction for aiding and abetting the falsification of bank records where the defendant was the recipient of loans as to which one Evans, the bank's assistant vice president, had falsified the records. The court, relying, *inter alia*, upon *Nye & Nissen*, held that it was sufficient, in the absence of any direct proof that the defendant knew the records were being falsified, to show that he was a long-time business associate of Evans, that he had done lawful favors for Evans, that he was experienced in banking and borrowing, and that he had received loans on very favorable terms.

In sharp contrast with *Hall*, the court in *Matthews* v. *United States*, 449 F.2d 985 (D.C. Cir. 1971), held 2-1 that a conviction for kidnapping across state lines could not be sustained on a theory of aiding and abetting even though the defendant was plainly a participant in the scheme to kidnap, where there was no evidence that the defendant knew that the victim would be transported by his confederates across state lines. In dissent, Judge Leventhal relied upon *Nye & Nissen* as supporting the sufficiency of the evidence to constitute aiding and abetting. See also *Bailey* v. *United States*, 416 F.2d 1110, 1115 (D.C. Cir. 1969), where a divided court held that "presence, association, and flight" were not sufficient under *Nye & Nissen* and related cases to support a conviction for aiding and abetting a robbery. And compare *Baker* v. *United States*, 395 F.2d 368 (8th Cir. 1968), where both the majority and the dissenter cited *Nye & Nissen* in hold-

ing that the defendant's past association with the car thieves and his presence in the car after the theft were insufficient to sustain a conviction for aiding and abetting the theft.

d. As even this brief review of recent cases demonstrates, this Court's decision in *Nye & Nissen* has left in confusion the question as to the circumstances under which a defendant charged as a principal in a criminal act may be convicted as an aider and abettor without any direct proof of essential elements of the crime. And we submit that the Court of Appeals in this case has carried *Nye & Nissen* far beyond its intended scope. Most important, we emphasize that the issue involved herein does not concern technicalities of procedure or the complexities of ill-defined guarantees unrelated to the fundamental issue of guilt or innocence. If consistently adhered to, the decision of the Court of Appeals in this case will make of the "aiding and abetting" charge a net broad enough to sweep in, and impose substantial prison terms upon, persons whose only "crime" is their ties of business, family, or friendship to the guilty parties or their presence in the vicinity at the time the crime is committed. This Court should immediately and emphatically prevent any such development.

2. The Court of Appeals' application of the federal statute prohibiting knowing possession of stolen property (18 U.S.C. § 659) to the facts of this case conflicts with several decisions of other Courts of Appeals and violates standards regarding permissible inferences or presumptions established by this Court in its decisions. It also renders nugatory the jurisdictional minimum prescribed by 18 U.S.C. § 2315 for federal prosecution of *sales* of stolen merchandise.

a. There was no evidence whatever in this record that petitioner ever was seen to have actual possession of or control over any portion of the merchandise stolen from the Brooklyn pier. While the decisions of Courts of Appeals interpreting 18 U.S.C. § 659 have recognized that "constructive possession" satisfies the statute, even "constructive possession" requires proof of "dominion and control." See, *e.g.*, *United States* v. *Casalinuovo*, 350 F.2d 207 (2d Cir. 1965), and authorities cited therein.

There could be no legitimate inference of "dominion or control" from petitioner's conduct in this case. Even if Hendler were absolutely accurate in his recollection, his testimony showed no more than that petitioner, as was her job, was selling stereos on behalf of a business firm that dealt in precisely that product. The fact that no bill was sent to Hendler in the 3 weeks after the shipment and that the goods arrived not from the Fried Trading Company but from some as-yet unknown entity in New York City tends to establish that the stereos were not in Mrs. Fried's possession. And the non-surreptitious nature of her telephone call and offer indicates that she had no guilty knowledge as to their source.

The Second Circuit's application of the possession standard of § 659 conflicts, in this regard, with the application by the Seventh and Ninth Circuits in *United States* v. *Wainer*, 170 F.2d 603 (7th Cir. 1948), and *Embree* v. *United States*, 320 F.2d 603 (9th Cir. 1963). In both *Wainer* and *Embree*, individuals who arranged or sought to arrange for the sale of merchandise which turned out to be stolen were held not to have had sufficient control over the merchandise to be convicted under 18 U.S.C. § 659. See also *United States* v. *Nitti*, 444 F.2d 1056 (7th Cir. 1971). The

definition of "possession" for purposes of 18 U.S.C. § 659—where the material possessed is usually merchandise that appears lawful on its face—should surely be no broader than the word as defined in 21 U.S.C. § 174, which relates to narcotic drugs. In cases such as *Hernandez* v. *United States,* 300 F.2d 114 (9th Cir. 1962), *Jensen* v. *United States,* 403 F.2d 1018 (9th Cir. 1968), and *United States* v. *Miles,* 293 F.2d 609 (3rd Cir. 1961), federal appellate courts have narrowed the definition of possession to exclude those who may be only peripherally involved in a transfer of narcotics. The same principle should apply here.

b. A narrow reading of possession is particularly appropriate here in light of the double inference arising out of a finding of possession. The statute makes possession an offense so as to secure interstate shipments against theft and embezzlement. In addition, however, guilty knowledge, which is a separate element of the offense, may be inferred from possession.[5] By permitting petitioner's conviction to rest entirely on her "constructive possession" of the stereos and allowing that to be used, as well, to establish guilty knowledge, the Court of Appeals applied that statute in a manner that conflicted with the Third Circuit's decision in *United States* v. *Russo,* 123 F.2d 420 (3rd Cir., 1941). In that case the Third Circuit reversed a conviction, holding that where the possession of stolen

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[5] In this case the judge instructed the jury immediately after explaining "constructive possession," that (App. 749):

> Possession by a defendant or by the defendants or property recently stolen, if not satisfactorily explained by other evidence in the case, is a circumstance from which you, the jury, may draw the inference that the person in possession of such recently stolen property knew that such property had been stolen.

property was not "actual and exclusive," there had to be "other circumstances shown from which the jury, without any consideration being given to the implied possession, could properly infer that the defendants had guilty knowledge." 123 F.2d at 442. In this case there was neither "actual" nor "exclusive" possession, and there was absolutely no other evidence from which the jury could infer guilty knowledge.

In *Turner* v. *United States,* 396 U.S. 398 (1971), this Court invalidated an inference that even small quantities of cocaine must be known by their possessors to have come from abroad. 390 U.S. at 418-419. The rationale of *Turner* and of *Leary* v. *United States,* 395 U.S. 6 (1969), invalidates the inference that someone in petitioner's position would know that merchandise she discussed one time on the telephone and arranged to have sold at a price comfortably above the lawful importer's cost would know that the merchandise is stolen merely because it was, in fact, stolen in the recent past.

c. Finally, to read 18 U.S.C. § 659 as applicable to anyone who aids and abets or facilitates a sale of stolen merchandise without more direct proof of possession, would vitiate the jurisdictional minimum prescribed by 18 U.S.C. § 2315. By providing in § 2315 that those who sell merchandise stolen from interstate commerce commit a federal offense only if the value of the merchandise is $5,000 or more, Congress was intending to keep out of the federal courts small transactions such as the one Hendler testified to. *United States* v. *Tippett,* 353 F.2d 335 (4th Cir. 1965), *cert. denied,* 383 U.S. 908 (1966). Only the broad reading given to possession by the Court of Appeals would bring such a transaction within § 659.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

Opinion

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 823—September Term, 1971

(Argued June 15, 1972 Decided July 25, 1972.)

Docket No. 72-1295

UNITED STATES OF AMERICA, *Appellee,*

v.

ZALI FRIED and SIMON BRACH, *Appellants.*

Before: KAUFMAN, HAYS and OAKES, *Circuit Judges.*

OAKES, *Circuit Judge:*

Appellants Fried and Brach, mother and son, appeal from convictions on one count of unlawful possession, 18 U.S.C. § 659, and one count of unlawful sale, 18 U.S.C. § 2315, of "Unisonic" AM-FM stereos moving as part of or constituting a foreign shipment of freight. Each appellant was convicted on both counts, but the jury was unable to agree on a theft count (18 U.S.C. § 659) and a conspiracy count (18 U.S.C. § 371) against appellants, or on counts against appellant Fried's husband, Ishak, and one Aaron Schatten. Some 589 cartons, each containing two sets of the Japanese eight-track stereo units—valued at over $62,000 in terms of the importer's cost—were stolen on October 22 and 23, 1970, from Pier 21 in Brooklyn, while consigned to the sole American importer, North American Foreign Trading Corporation ("North American"). The theft was discovered on October 26, and within weeks three separate quantities of the missing stereos were found, in the hands of a New York City retailer, Joseph Levy, a Philadelphia wholesaler, William Hendler, and retailers who had purchased sets from a Pennsylvania wholesaler, Carl Beddo.

Of the 85 stereo units seized from an Orchard Street loft in Manhattan from Levy, at least 82 bore serial numbers falling within the range of serial numbers for the missing units. Only one shipping carton was found at Levy's, and that in the hallway immediately outside the storeroom. Twenty-two units were seized from Hendler along with ten empty cartons; of these, 20 units and eight cartons bore stolen serial numbers. Six units were taken from purchasers from Beddo, of which five bore numbers within the indicated range. Not insignificantly, all of the units seized from Levy and Hendler and at least half of those seized from customers of Beddo were sold by people connected with Fried Trading Co., a Brooklyn firm owned by appellant Zali Fried and her husband, and employing appellant Brach as a trucker.

While appellants dispute the sufficiency of the evidence, there were ample facts to support their convictions. On October 28, 1970, according to Hendler, Mrs. Fried called him and sold him over the telephone "a couple of dozen" of the stereos at only $5.00 per unit above North American's cost and a full $7.00 below North American's lowest selling price to retailers. Curiously, Hendler received no bill or invoice from the Frieds when the units were delivered a few days later, and the shipping label on the cartons referred to a supposed Manhattan company—the "G & S Trading Co."—that was later shown to be fictitious. Appellant Brach disclaims knowledge that the stereos he delivered to Levy had been stolen, suggesting that it was coincidence that he had Levy's 100 stereo units delivered in a truck driven by a part-time New York City policeman, who was "moonlighting" for Brach's trucking business. But no invoice or bill was received for these units either, and Brach retained the receipt for the goods he had Levy sign. Beddo purchased his stereos over-the-tailgate, so to speak, out of a parked truck at the Fried place of business from one of the younger Fried sons. It remains a bit of a

mystery how Fried Trading Co. people in late October 1970 became Unisonic purveyors, for nobody connected with Unisonic or North American ever sold stereos to the Frieds or their firm. A footnote is that the Fried Trading Co. does import Japanese stereos, but these are brand-named "Granada" and not "Unisonic."

It may be that, giving appellants the benefit of the doubt, the evidence against appellants is circumstantial because not all of the stereos and cartons seized fit the range of serial numbers on the bill of lading for the stolen stereos or because there is nothing to match each stereo unit to a carton. So is most evidence, however, upon close analysis, and when stereos with the same serial numbers as the missing units in 80 or 90 per cent of the cases, and cartons with the same numbers in several instances are sold by a business that has never bought them, at a price a little lower than the usual wholesale price, and without the customary invoicing, the inference that can be drawn by a rational trier of fact is not very remote. To appellate judges who review records, it is difficult to see how any other inference could be drawn in this case.

While there was no direct evidence connecting appellant Fried with the Levy sale, in light of her participation in the Hendler sale and her activity in a managerial capacity in the family business operation, *see Nye & Nissen* v. *United States*, 336 U.S. 613, 619-20 (1949), and in light of what was a sound and fair aiding and abetting charge, she was properly found guilty on the Levy sale count. *Cf. United States* v. *Callahan*, 439 F.2d 852, 861-62 (2d Cir.), *cert. denied*, 404 U.S. 826 (1971).

Brach's knowledge that the Levy stereos had been stolen was also proven inferentially only, but it was proven—not merely because the goods his trucking concern delivered were stolen or by his relationship to his mother as a Fried Co. owner, but also by the unusual circumstances of his delivery of $5,000 worth of stereos without a bill or an

invoice and by the use of a part-time police officer for delivery purposes, thereby removing Brach himself from transportation of the stolen goods, although he was on hand at Levy's at the time of delivery. *Cf. United States* v. *Edwards*, 366 F.2d 853, 867 (2d Cir. 1966), *cert. denied*, 386 U.S. 908 (1967) ("surreptitious and furtive" transfers of stock in bars and lavatories for fraction of face value circumstantial evidence of theft and knowledge that stock was stolen). Even if this evidence were not enough standing alone, " '[p]ossession of the fruits of crime, recently after its commission, justifies the inference that the possession is guilty possession, and, though only *prima facie* evidence of guilt, may be of controlling weight unless explained by the circumstances or accounted for in some way consistent with innocence.' " *United States* v. *Minieri*, 303 F.2d 550, 554 (2d Cir.), *cert. denied*, 371 U.S. 847 (1962), *quoting Wilson* v. *United States*, 162 U.S. 613, 619 (1896). In light of the circumstances just recited, Brach's failure to offer any explanation is fatal to his claim of innocent possession.

Appellant Fried claims prejudice from the testimony of two witnesses. One, Levy, volunteered, not responsively, that Ishak Fried's brother had told him, "It's better to be in jail than to be dead." Upon prompt objection this testimony, however, was stricken and the jury instructed to disregard it; its obvious impropriety as hearsay cannot be deemed of such lasting or permeative influence as to be prejudicial in any real sense of the word. Our regard for the jury system is too high to warrant a view that duly stricken testimony of this nature would be given credence or, if given credence, would influence the verdict.

The other witness, FBI Agent Michael Downey, testified that only a month or so before the Unisonic stereos were missed from Pier 21 he had found at the Fried place of business a carton of men's jackets also stolen from a Brooklyn pier. This testimony could not properly have

been elicited in the Government's direct case to show a probability that the defendants committed the charged crime because they were of bad character, *United States* v. *Bozza*, 365 F.2d 206, 213 (2d Cir. 1966), and even though it might have gone to the issue of guilty knowledge or intent, *see United States* v. *Deaton*, 381 F.2d 114, 117-18 (2d Cir. 1967), and authorities cited therein, it was not so limited after proper and timely objection. The testimony was, however, produced only on rebuttal, after Ishak Fried had testified, on cross-examination to be sure, that he could not recall any previous seizure of new merchandise but that he had had on the premises shoes, old clothing and dresses for distribution to the poor through his yeshiva. Thus it did go toward his credibility. That the admission of this testimony, even if erroneous as being hearsay, was not prejudicial may be inferred from Ishak Fried's acquittal in this 9-day trial. The evidence against Zali Fried was more than enough to justify a conclusion that admission of Downey's testimony was harmless.

Finally, the argument that the carton found in the hallway of Levy's loft was not admissible is grasping at straws. While the hallway may have been used by other tenants, the Waterfront Commission agent who found the carton discovered it just outside the Levy door, which in turn was "isolated by itself. . . ." With a veritable treasure trove of pirated eight-track units inside the loft, absent their cartons, and proof of the sale of cartons and stereos by the Frieds to Levy, the inference that a carton located outside an isolated door in the hallway might have come from Levy's by way of the Frieds is not, we think, altogether unwarranted or unjustified.

Judgment affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-491

SIMON BRACH, PETITIONER

v.

UNITED STATES OF AMERICA

No. 72-492

ZALI FRIED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pets. App.) is reported at 464 F. 2d 983.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 1972. Mr. Justice Marshall extended the time

for filing the petitions for writs of certiorari to September 23, 1972, and on that date the petitions were filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the conviction of petitioner Fried for aiding and abetting the sale of stolen merchandise was proper.

2. Whether petitioner Fried's conviction for possession of stolen goods under 18 U.S.C. 659 is supported by the evidence.

3. Whether the admission of evidence of a co-defendant's extra-judicial statement that he knew petitioner Brach constituted reversible error.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioners Fried and Brach were convicted of having possessed and then sold stolen property in violation of 18 U.S.C. 659 and 2315 respectively.[1]

With respect to their convictions under 18 U.S.C. 659, both petitioners were sentenced to three years' imprisonment and petitioner Fried was fined $5000. With respect to their convictions under 18 U.S.C. 2315, petitioner Fried was placed on two years' probation and petitioner Brach on four years' probation. The court of appeals affirmed (Pets. App.).

The evidence adduced at trial showed that on October

[1] The jury was unable to agree on counts involving co-defendants Ishak Fried, petitioner Fried's husband, and one Aaron Schatten. Schatten subsequently pleaded guilty to a violation of 18 U.S.C. 659.

22 and 23, 1970, some 589 cartons, each containing two units of Japanese stereos, were stolen from Pier 21 in Brooklyn, New York (A. 258-269, 339).[2] Thereafter, eighty-five stereo units were seized by law enforcement officers from a New York City retailer, Joseph Levy, twenty-two from a Philadelphia wholesaler, William Hendler, and six units from customers of a Shamokin, Pennsylvania wholesaler, Carl Beddo (A. 494-509, 512, 426-429, 487-492). Most of the stereos seized bore serial numbers matching those of the units stolen from Pier 21 (A. 350, 454-456, 489-492).

The government's evidence further showed that petitioner Fried offered Hendler a quantity of the stereo units at a price well below the normal selling price for the units (A. 206-208). Hendler thereafter received thirty stereos, unaccompanied by a bill or invoice, in cartons bearing the name of a fictitious company (A. 208-215, 530-532). This transaction was the basis for petitioner Fried's conviction under 18 U.S.C. 659.

Similarly, petitioner Fried's husband sold Levy a number of stereo units for less than the market price (A. 26). One hundred stereos were delivered to Levy's business by a New York policeman who worked part-time for petitioner Brach, Mrs. Fried's son (A. 26-27, 158-165). At the time of the delivery, Levy signed a receipt at Brach's request which Brach retained. No invoice or bill, however, was ever received by Levy (A. 29-34).

Carl Beddo purchased a small quantity of stereos

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[2] "A." refers to the Joint Appendix for Appellants filed in the court of appeals, a copy of which is being lodged with the Clerk of this Court.

from the Fried company on November 2, 1970. The units were purchased from another of petitioner Fried's sons and were transferred from a truck parked near the Fried firm to Beddo's car (A. 469-473).

A vice-president of North American Foreign Trading Corporation, the exclusive importers of the brand of stereos involved here, testified that North American did not sell any stereos to the Frieds during the months in question (A. 324). He further testified that none had ever been sold directly to the Frieds, Brach, Hendler or Beddo (A. 324, 647, 656).

ARGUMENT

1. Petitioner Fried contends that her conviction under 18 U.S.C. 2315 was improperly based on a charge that she had aided and abetted the sale of the stolen stereos to Levy. She asserts that the evidence was insufficient to support the charge and that the decision below improperly extended this Court's decision in *Nye & Nissen* v. *United States,* 336 U.S. 613. As the Court stated in that case: "In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by action to make it succeed.' L. Hand, J., in *United States* v. *Peoni,* 100 F. 2d 401, 402." 336 U.S. at 619. The evidence showed that petitioner Fried participated in the management and control of the business and actively solicited the sale of the stolen stereos to Hendler well below the normal selling price of the units, that one of her sons sold stolen stereo units to Beddo and that her husband had sold some of the

units to Levy. Under these circumstances, the application of *Nye & Nissen* was proper. The jury, which was properly instructed on aiding and abetting,[3] could conclude from the evidence that petitioner Fried had associated herself with the venture and had sought by her actions to make it succeed. See *United States* v. *Callahan,* 439 F. 2d 852, 861-862 (C.A. 2), certiorari denied, 404 U.S. 826.

2. Petitioner Fried also contends that there was insufficient evidence to support her conviction under 18 U.S.C. 659 for possession of the stereos knowing them to have been stolen. That petitioner Fried knew the stereo units were stolen, however, is supported by the evidence showing that she not only arranged for a sale of some of the stolen stereos at an unusually low price, but also was associated with the scheme to sell the entire lot of the units. By soliciting the sale to Hendler of the stolen units, which were subsequently delivered, petitioner Fried exercised sufficient dominion and control over the units to be deemed to be in constructive possession of them. See, *e.g., United States* v. *Cousins,* 427 F. 2d 382 (C.A. 9); *United States* v. *Casalinuovo,* 350 F. 2d 207 (C.A. 2). Contrary to petitioner Fried's assertion, the decisions in *United States* v. *Wainer,* 170 F. 2d 603 (C.A. 7), and *Embree* v. *United States,* 320

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[3] The district court instructed the jury as to the acts necessary for petitioner to be found guilty as an aider and abettor as follows (A. 740):

> In other words, anyone who shares in the criminal intent of the principal and is willfully associated with the venture in a way that by his action he will fully participate or assist in bringing about the ultimate result is, under this section, in the same position as a principal.

F. 2d 666 (C.A. 9), are not in conflict with the decision below. In *Wainer*, the evidence showed only that the defendant arranged for a sale of stolen goods from one person to another. There was no evidence that the defendant had any other dealings with the goods. Likewise, in *Embree*, the only damaging evidence was that the defendant stated to another that a third party had goods for sale and at the buyer's request obtained the selling price. The evidence in the present case shows a sale, upon petitioner Fried's solicitation, of a number of stolen stereos by a business operated in part by her. This was enough to establish constructive possession.[*]

Petitioner Fried contends that under *United States* v. *Russo*, 123 F. 2d 420 (C.A. 3), it was improper to infer solely from her mere constructive possession of the stolen stereos that she knew the units were stolen. While inferences of guilty knowledge may be drawn from constructive as well as actual possession (see *Rugendorf* v. *United States*, 376 U.S. 528, 536-537; *United States* v. *Carnegella*, 198 F. 2d 3 (C.A. 7), certiorari denied, 344 U.S. 881), the finding of guilty knowledge in this case is not based solely on such an inference. As we have noted, the fact that petitioner Fried solicitated the sale at a low price and was associated with the other sales also supports a finding of guilty knowledge (see Pet. App. 3a).

Finally, petitioner Fried maintains that her conviction under 18 U.S.C. 659 cannot be sustained because

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[*] The cases cited by petitioner Fried (Pet. 13) involving the possession of narcotics concern individuals who were not directly associated with a sale or transfer of narcotics. Here, petitioner Fried was directly involved with the sale of the stereos.

Congress intended to preclude prosecutions of persons who knowingly possess stolen merchandise of a value less than $5,000. But the monetary limitation imposed by 18 U.S.C. 2315 is not applicable to a conviction under 18 U.S.C. 659. The gravamen of an offense under Section 659 is possession of property stolen from interstate or foreign commerce; the value of the property stolen is relevant only to a determination whether a crime is a felony. *Robinson* v. *United States*, 333 F. 2d 323, 326 (C.A. 8); *United States* v. *Gordon*, 253 F. 2d 177 (C.A. 7), reversed on other grounds, 344 U.S. 414; see also *United States* v. *Cousins*, *supra*, 427 F. 2d at 384-385.

3. The evidence established that co-defendant Schatten drove the truck that picked up the stereos from Pier 21 in Brooklyn. At trial, FBI agent Michael Downey testified that he arrested Schatten and questioned him concerning the theft. Agent Downey, when asked if Schatten had stated whether or not he knew petitioner Brach, stated "yes, he did." Petitioner's objection to this questioning was overruled (A. 535-538). Petitioner Brach now claims that the admission of this statement into evidence was improper under this Court's decision in *Bruton* v. *United States*, 391 U.S. 123. This contention was not advanced below and thus is not properly before the Court. *Lawn* v. *United States*, 355 U.S. 339, 362-363, n. 16. Moreover, the rule of *Bruton*, that a co-defendant's statement incriminating the defendant cannot be introduced unless that co-defendant is available for cross-examination, was not violated here. Schatten's statement that he "knew" petitioner Brach was not incriminating since it did not

implicate Brach in the crime. The record establishes, by wholly independent evidence, that Brach was involved in the sale and possession of the stolen stereos, by reason of his participation in the delivery of a quantity of the units to Levy and his part in the management of the Fried company.

CONCLUSION

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

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NOVEMBER 1972.

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